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(Article begins on next page)

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SYMPOSIUM
A DUTY TO REPRESENT? CRITICAL
REFLECTIONS ON *STROPNICKY v.*
NATHANSON

FOREWORD: OF LEGAL ETHICS, TAXIS,
AND DOING THE RIGHT THING

MARTHA MINOW*

When Judith Nathanson, an attorney, declined Joseph Stropnick's request for legal representation in a divorce, she took a stand. She asserted her commitment to representing only women in divorces. Nathanson could have simply said she was too busy, or she did not like Stropnick's tone of voice, or otherwise tried to duck the case. By indicating instead a considered judgment against representing men, Nathanson opened herself up to a charge of sex discrimination. Stropnick made that charge, and won before the Massachusetts Commission Against Discrimination ("MCAD").¹

The editors of this journal have responded by taking their own stand. They do not advocate one side in the case, or even one strand of argument or issue. But by devoting a symposium issue to the case, they expend their most valuable resource, their pages, on the conviction that the case and the issues it raises are worth your most valuable resource, your time. I think they are right.

As the fascinating and thoughtful symposium contributions indicate, the case raises many issues about the current and potential scope and definition of illicit sex discrimination,² the reach of constitutional freedom of speech and freedom of association defenses,³

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1. See *Stropnick v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

2. See Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 W. NEW ENG. L. REV. 79 (1998); Sam Stonefield, *Lawyer Discrimination Against Clients: Outright Rejection—No; Limitations on Issues and Arguments—Yes*, 20 W. NEW ENG. L. REV. 103 (1998).

3. See Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49 (1998); Bruce K. Miller, *Lawyers'*

the special demands of civil rights lawyering,⁴ the aspirations and realities of legal work,⁵ and the significance of the individual person's identity, beliefs, reputation, and sheer embodiment in the acts of legal representation.⁶ It might initially seem that the presentation of the issues is imbalanced, given the presence of only one contribution that expressly supports sanctions against Judith Nathanson.⁷ Yet, the numerous contributions defending Nathanson raise and develop arguments against the current law, summarized in the decision of the MCAD to sanction Nathanson. In addition, the sheer variety of argument proffered on Nathanson's behalf in this symposium should not be understood as overwhelming evidence that she was right. Instead, that variety may indicate the basic difficulty in articulating one knock-out argument on her behalf.

That said, I share the view taken by most of the contributors here that as a matter of law, Nathanson should be allowed to turn down Stropnicki based on her commitment to eradicate gender bias in the realm of divorce law. The seemingly varied arguments grounded in statutory construction, freedoms of speech and association, a plethora of analogies,⁸ and assessments of what makes lawyers effective converge⁹ around a central idea: Lawyers bring too much of their own selves to the task of lawyering to be compelled to represent any particular individual. Lawyers are not like taxi drivers who must take all comers because lawyers transport clients with their words, reputations, and personal credibility, not with a standard-issue vehicle. Moreover, any other rule will simply lead to less honest (but perfectly lawful) rejections than the one Nathanson gave to Stropnicki. So any other result would promote lies by lawyers (not exactly what the world needs) and probably insurmountable enforcement difficulties. In discussing the legality of client

Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson, 20 W. NEW ENG. L. REV. 93 (1998).

4. See James A. Gardner, *Section 98 and the Specialized Practice of Civil Rights Law*, 20 W. NEW ENG. L. REV. 39 (1998).

5. See Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23 (1998).

6. See Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998); Chris K. Iijima, *When Fiction Intrudes upon Reality: A Brief Reply to Professor Chin*, 20 W. NEW ENG. L. REV. 73 (1998). All of the articles in the symposium deal to some degree with the issues affecting the place of an individual's identity and belief in the practice of law.

7. See Stonefield, *supra* note 2, at 136.

8. See, e.g., Miller, *supra* note 3, at 99.

9. See, e.g., Chin, *supra* note 6, at 14-15 (arguing that a lawyer who is forced to represent a particular client is unlikely to do a sufficient job).

rejection, I mean here only to raise your curiosity, not to end consideration of the legality of the matter. Read the contributions to the symposium, and the MCAD decision; judge for yourself.

Yet having concluded, for myself, that Nathanson and other lawyers should have the ability to select and reject clients based on political visions and personal commitments, I also think that Nathanson made a mistake in rejecting Stropnick. I base this on a friendly interpretation of, or if necessary, amendment to Nathanson's own asserted commitments to end gender bias in divorce. Nathanson's view, which I share, is that women's historic roles in the family and the labor market place them at a disadvantage in the dissolution of marriage under both traditional rules and emerging rules that favor gender neutrality. Traditional rules explicitly confined women's claims to property division and custody to their subordinate status in the family and in the workplace. Current rules claiming gender neutrality devalue the disproportionate contribution most women make to making a home and taking care of children while also leaving women to the still-unequal opportunities in the labor market.¹⁰

Notice, however, how I felt compelled to write "most women" in the last sentence. It just is not true that all women do the homemaking and childcare in all families. To talk or think otherwise is to make the same mistake of equating actual individuals with predominant patterns that has generated and perpetuated gender stereotypes and disadvantages through time. It is inaccurate and potentially harmful to human freedom to use the short-hand of "women" when we actually mean individuals who suffer from the confines of a homemaking and child rearing role without receiving adequate monetary or other compensation for their work. That is the mistake that feminist theorists have called "essentializing gender."¹¹ A strong point of the anti-pornography ordinance drafted and unsuccessfully defended by Catherine MacKinnon and Andrea Dworkin is its intended protection for men put in the position traditionally occupied by women.¹²

Mr. Stropnick at least claimed that he fell in the position traditionally occupied by women in marriage. He stayed at home, out

10. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 4 (1991).

11. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

12. See Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

of the economic market; he cared for the house and children. Perhaps these were not accurate claims. Perhaps he could pursue economic opportunities after divorce that would not be open to most women. Either of these possibilities would distinguish his situation from the position of subordination, the traditional female position in marriage, that characterizes Nathanson's concerns in her divorce practice, and specific conclusions about them could well justify rejecting his request for representation. Yet failing to pursue his request to the point of specific conclusions, and treating him as simply beyond her scope of concern because of his sex and gender, makes the mistake of essentializing gender. Nathanson should have the right to make the mistake, but I think she, and other feminist lawyers can do better.

But what will endure about this case, even after all appeals are exhausted, is not a judgment about the wisdom of her choice or even, perhaps, its legality. What will endure, I hope, is heightened reflection about the obligations and demands of lawyering. We are indeed persons when we provide legal services, and our very personhood is crucial to both the appearance and reality of legal work. Our beliefs, our words, our genders, races, and reputations infuse, enable and limit what we can offer those in need of legal help. We sometimes do and always should be able to marshal our very selves as lawyers on behalf of causes. That doing so will on occasion produce hard personal and professional choices should make us act with care, and attention to the particular and long-term consequences of our actions.